

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CAPP No.14 of 2015 (O&M)

Date of decision:13.05.2015

UV Asset Reconstruction Company Ltd.

....Appellant

Versus

Pasupati Haryana Woollens Ltd. (in liquidation) & others

.....Respondents

**CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE G.S.SANDHAWALIA**

Present: Mr.Anand Chhibbar, Sr.Advocate
with Mr.Gaurav Mankotia, Advocate, for the appellant.

Ms.Nimrata Shergill, Advocate, for respondent No.1.

Mr.Sandeep Suri, Advocate, for respondent No.3.

Ms.Harpreet Kaur, Advocate, for respondent No.6.

Mr.Sumit Batra, Advocate, for respondent No.7.

S.J.Vazifdar, Acting Chief Justice (Oral):

1. This is an appeal against the order of the Learned Company Judge, only to the extent that the Learned Judge directed that the sale of the assets are also to be got confirmed by the Company Court. The appellant, who has taken steps under the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (for short, the 'SARFAESI' Act), has no other grievance against the impugned judgment.

2. Mr.Chhibbar, Learned Senior Counsel, appearing on behalf of the appellant, contended that the direction that the sale shall also be got confirmed by the Company Court, is contrary to the provisions of the SARFAESI Act. He has relied upon a judgment of the Division Bench of the Delhi High Court in Kotak Mahindra Bank Ltd. Vs. Megnostar Telecommunications Pvt. Ltd. & another [2013] 176 Company Cases 246. However, the Division Bench of the Delhi

High Court has taken a view contrary to the view taken by a Division Bench of this Court in the case of Haryana State Industrial & Infrastructure Development Corporation Vs. Haryana Concast Ltd. 2010 (2) PLR 295. We are bound by the judgment of the Division Bench of this Court.

3. The Division Bench of this Court in the case of Haryana State Industrial & Infrastructure Development Corporation (supra), held as under:

“32. Once the aforesaid legal position of the Company Court vis-à-vis the State Financial Corporation and Debt Recovery Tribunal is clear then by virtue of the same logic if the securitisation company seeks to sell or transfer the assets of a borrower company in liquidation opting the course under Section 13(4) of the SARFAESI Act then it follows that such a power could be exercised by a securitisation company only after obtaining permission from the Company Court and acting in terms of the directions issued by that Court. The aforesaid view has been followed and applied by Hon'ble the Supreme Court in para 40 of the judgment in the case of Bakemans Industries Pvt. Ltd. (supra) by following the reasoning given in the case of Rajasthan State Financial Corporation (supra) which has already been extracted in the preceding para.

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34. Once the aforesaid legal position is clear then it has to be concluded that the Company Court enjoys the jurisdiction to issue directions to a securitisation company or a secured creditor who might have opted to stay outside the winding up and has invoked its power under Section 13(4) of the SARFAESI Act. Therefore, we find that the learned Company Judge has correctly appreciated the issue when it placed reliance on a judgment of Allahabad High Court in the case of In Re: BPL Display Devices (supra) and proceeded to observe in para 11 as under:-

"11. The Allahabad High Court identified the objects of the SARFAESI Act as providing for enforcement of Securities Act without any intervention of Court or Tribunal and went on to hold on a point which it had earlier observed that was not a pointed controversy that "there was no apparent conflict between SARFAESI Act and the Companies Act and therefore does not appear to be any conflict between the sale of the

security interest. The SARFAESI Act has to be harmonized in that the Act itself declares that is in addition and not in derogation of the Companies Act. It said at paragraph 41 that the objects of speedy recovery of loan from non-performing assets would be defeated if the O.L. would intervene to enforce the provisions of the Companies Act and to monitor each step of the securitization and enforcement of Security interest. The Company Court therefore must allow the provisions of SARFAESI Act to be put into motion even if the proceedings of the winding up have been recommended or are pending of that Company is under liquidation. The statutory duties of the Company Court for protecting the workmen's dues, and interest of the other stake holder including the public interest will however, oblige the Court to be informed with the process of sale".

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37. We are in entire agreement with the view taken by the learned Company Judge because Section 35 of the SARFAESI Act provide for overriding effect of its provisions with a non-obstante clause of anything inconsistent with the provisions of that Act. It is only the inconsistency which would bar the application of other laws and not otherwise. There is no inconsistency in issues of supervisory directions in order to achieve the avowed object of Section 529A of the Act as echoed by unnumbered five provisos of Section 13(9) of the SARFAESI Act because there is no provision in the SARFAESI Act giving any conflict with the claim of the workers due as contemplated by Section 529A of the Act. It is further pertinent to notice that a Division Bench of this Court has already upheld the order under challenge when its reasoning was adopted by the learned Company Judge in the case of Dhir and Dhir Asset Reconstruction and Securitisation Company (supra). The appeal against the order dated 26.3.2009 passed by the learned Company Judge in the aforesaid case has been dismissed by a Division Bench of this Court (of which one of us, M.M. Kumar, J. was a member). In para 2 of the judgment in Dhir and Dhir Asset Reconstruction and Securitisation Company (supra) a pointed reference has been made to the order under challenge and same reasoning adopted by the learned Company Judge, which reads as under:-

"2. The Appellant Reconstruction Company moved an application being CA No.151 of 2009 for modification of order dated 6.2.2009 passed by the learned Company Judge directing that assets of the company were not to be sold by any party without leave of the Court and had issued notice. The learned Company Judge adopted the reasoning given by him in his decision dated 20.3.2009 rendered in the case of [PEGASUS Asset Reconstructions Company Pvt. Ltd. v. Haryana Concast Ltd.](#) in CA Nos. 704 and 705 of 2008 in CP No. 133 of 2003 alongwith other Company Applications. In that judgement, the learned Company Judge made an attempt to harmonize the SARFAESI Act and the Companies Act."

38. Noticing the aforesaid order the Division Bench rejected the hypothesis of absolute freedom claimed by the securitisation company in the said case and proceeded to observe as under:-

"6.A perusal of the directions issued in para 8 of the order, extracted above, shows that it is left open to the Appellant Reconstruction Company to move the Company Court for appropriate directions if the petition for winding up is considered favourably. The winding up petition is still pending. The situation is fluid in the sense that at this stage it cannot be concluded as to whether there would be an order of winding up or not. If there is an order of winding up then the labour dues as contemplated by Section 529A of the Companies Act would require to be paid by the Appellant Reconstruction Company as per the requirement of Section 13(9) of the SAR- FAESI Act. The directions issued by the learned Company Judge do not go to the extent of stopping the working of Appellant Reconstruction Company. The directions in fact are supervisory in nature and aims at ensuring that dues of every one as permissible by law gets paid. The learned Company Judge has further issued supervisory directions by asking the Appellant Reconstruction Company to refrain from appropriation or disbursal of the sale proceeds without leave of the Court. It is not a case where it could be said that the learned Company Judge had interfered with the functioning of the reconstruction company because as and when any funds are required to be spent as per the provisions of Section 13 (7) of the SARFAESI Act it could be done by the leave of the Court. The Appellant-

Reconstruction Company has been granted liberty not only to take possession of the assets but to even proceed with the sale of those assets subject to a rider that no appropriation or disbursal of the sale proceeds is to be undertaken by the Appellant- Reconstruction company without leave of the Court. We are not persuaded to accept the thesis propounded by Mr. Ashok Aggarwal, learned senior counsel, that the appellant-reconstruction company is a completely 'free bird'. A perusal of Section 13(9) of the SARFAESI Act would show that labour dues as contemplated by Section 529 A of the Companies Act have to be paid by the appellant reconstruction company. At this stage it would be the duty of the learned Company Judge to ensure that provisions of Section 13(9) are complied with. It is worthwhile to notice that the appellant- reconstruction company is already kept outside the winding up and is required to give information to the Official Liquidator with regard to the proposal of sale etc. The sale notice to the public has to contain clause that winding up proceedings are pending before the Company Court. These directions are merely supervisory in character and do not put such fetters so as to conclude that the Appellant Reconstruction Company cannot conduct its function properly. The appeal does not warrant admission and the same is dismissed." (emphasis added)

4. Paragraph 32 of the above judgment itself makes it clear that the Division Bench held that the securitization Company that seeks "sale or transfer" of the assets of a borrower Company in liquidation under Section 13 of the SARFAESI Act, must do so only after obtaining the permission of the Company Court and act in terms of the directions issued by that Court.

5. Mr.Chhibbar submits that the judgment is contrary to the SARFAESI Act. It is neither necessary nor open to us to question the correctness of the judgment. We are bound by the judgment of this Court. The appellant's remedy, if any, is to challenge the same.

6. The Delhi High Court has taken a contrary view. For the sake of convenience, we will only reproduce the relevant part of the judgment. The same

reads as under:

“28. We are therefore of the view that, (even where the debtor/borrower/mortgagor is a company in liquidation) there is no necessity of associating the Official Liquidator in the sale in exercise of powers by a secured creditor under Section 13(4) of the SARFAESI Act. The sale, without associating the Official Liquidator cannot thus held to be bad or illegal. The dicta in Rajasthan Financial Corporation of associating the Official Liquidator in sale, in the context of the SFC Act and the DRT Act in both of which sale is through the intervention of the District Judge or the DRT, is not applicable to a sale under the SARFAESI Act, sale whereunder is without the intervention of the Court.

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29. The remedies of the Official Liquidator with respect to such a sale are only before the DRT in accordance with Section 17 of the SARFAESI Act and not before the Company Court. SARFAESI Act being a latter legislation to the incorporation of Section 529A in the Companies Act thus prevails over the Companies Act and sale as provided for under the SARFAESI Act holds good during the pendency of winding up petition against the debtor/borrower/mortgagor and also after a winding up order is made and remains unaffected therefrom.

30. We are therefore, with respect, unable to agree with the dicta of Punjab & Haryana High Court in Haryana Concast Limited (supra) and axiomatically allow these appeals and set aside the judgment of the Learned Single Judge. The applications filed by the Bank and the auction purchaser for de-sealing of the property would thus stand allowed. However, the sale proceeds in custody of the bank are subject to the claims if any under Sections 529 and 529A of the Companies Act. The bank to accordingly comply, specially with the provisos to Section 13(9) of the SARFAESI Act. We may highlight that the Supreme Court recently in Employees Provident Fund Commissioner Vs. Financial Liquidator of Esskay Pharmaceuticals Limited (2011) 10 SCC 727 has also held the dues under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 to be a first charge on the assets of an establishment and to be paid in priority to all other debts while distributing the sale proceeds. However, since we have differed from the view taken by other High Courts, to give time for approaching the Supreme Court, we grant eight weeks time to the

Official Liquidator to de-seal the premises and to put the auction purchaser into possession of the property. The Official Liquidator, if of the view that the sale by the Bank is in contravention of the SARFAESI Act and the Rules framed thereunder, shall also have liberty to approach the DRT under Section 17 thereof, within the said time of eight weeks.”

7. In view of the judgment of the Division Bench of this Court in the case of Haryana State Industrial & Infrastructure Development Corporation (supra), the appeal is dismissed.

(S.J.Vazifdar)
Acting Chief Justice

13.05.2015
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(G.S.Sandhawalia)
Judge